DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PROCEEDINGS AND ORDERS

DATE: 01158

CASE NBR 85-1-00391 CSY
SHORT TITLE Young, Sonia
VERSUS Arkansas

DOCKETED: Sep 6 1985

Date	Proceedings and Orders
Sep 6 1985	Petition for writ of certiorari filed.
Sep 17 1985	Waiver of right of respondent Arkansas to respond filed.
Sep 25 1985	DISTRIBUTED. October 11, 1985
Oct 7 1985	Response requested. (Due November 6, 1985 - NONE RECEIVED)
Oct 24 1985	Order extending time to file response to petition until November 28, 1985.
Nov 25 1985	Brief of respondent Arkansas in opposition filed.
Nov 26 1985	REDISTRIBUTED. December 13, 1985
Dec 16 1985	REDISTRIBUTED. January 10, 1986
Jan 13 1986	Petition DENIED. Dissenting opinion by Justice White, with whom Justice Brennan joins. (Detached opinion.)

PETITION FOR WRIT OF CERTIORARI

85-391

No.

IN THE

Supreme Court of the United States

October Term, 1985

SONIA YOUNG,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, AR 72201
(501) 371-9131

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the Arkansas indecent exposure statute is unconstitutionally overbroad under the First Amendment when it is applied to criminalize mere nude dancing in an enclosed business establishment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND CONSTITUTIONAL PROVISIONS:

In the

Supreme Court of the United States

October Term, 1985

SONIA YOUNG,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

OPINIONS BELOW

The opinion of the Arkansas Supreme Court, App. B, infra, 10a-18a, is reported at 286 Ark. 413, 69[illegible] S.W.2d 752. The opinion of the trial court finding petitioner guilty rejecting petitioner's constitutional defenses and challenge to the state statute is unreported and is reproduced as App. A, infra, 1a-9a.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered July 8, 1985. This petition is filed within sixty days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the U.S. Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment to the U.S. Constitution, § 1:

> . . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

Ark.Stat.Ann. § 41-1812:

(1) A person commits indecent exposure if, with purpose to arouse or gratify the sexual desire of himself or of any other person, he exposes his sex organs:

(a) a public place or public view; or
(b) under circumstances in which he knows his conduct is likely to cause affront or alarm.

(2) Indecent exposure is a class A misdemeanor.

STATEMENT OF THE CASE

A. Introduction

Petitioner was a nude dancer who was convicted of the offense of indecent exposure in violation of Ark.Stat.Ann. § 41-1812 and fined $1,000 and sentenced to a year in the County Jail. The jail term was suspended "conditioned on her not appearing nude in a public place for commercial exploitation or sales promotion any

more or appear nude in bars or beer joints." (T. 33A)

The case was investigated and prosecuted by the State under the theory that nude dancing is the crime of indecent exposure. Petitioner defended primarily on the ground that mere nude dancing is constitutionally protected under the First Amendment to the United States Constitution, so the Arkansas indecent exposure statute must be construed to permit mere nude dancing. Petitioner thus challenged the statute or applied under the First Amendment[1] (T. 5-31) Little Rock had nude dancing for nearly three years as a result of a 1981 Little Rock Municipal Court ruling which was never appealed by the State. (T. 7, 28-31).

B. The relevant facts

The case arose when the Little Rock Police Department Vice Detail, in conjunction with the

---

1. Petitioner also defended on statutory construction grounds which were rejected and are not before this Court.

Arkansas Alcoholic Beverage Control Enforcement Division and the Pulaski County (Arkansas) Sheriff's Department Criminal Investigation Division, arrested nearly every nude dancer in metropolitan Little Rock, Arkansas in two separate "sweeps" in February 1984. They were charged in the Pulaski County Municipal Court in a publicly admitted act of forum shopping to avoid the prior ruling of the Little Rock Municipal Court. (See T. 11-12)

In petitioner's case, ABC undercover officer Rulene Staggs entered D.L.'s Darkroom, a Little Rock tavern, on Febr:ary 24, 1984, under instructions to identify nude dancers and report to vice officers outside who would go in and make the arrest.[2] Her instructions from vice officers were and her belief was that mere nudity was enough to constitute a violation of the Arkansas indecent exposure statute. (T. 45).

---

2. The ABC participated in the case to look for ABC regulations. There was no law in force at the time prohibiting nude dancing in bars or taverns in Arkansas.

D.L.'s Darkroom advertised itself as having "Beer, Pool, and Nude Dancers." It was a concrete block building with no windows. Painted on the building were signs mentioning nude dancing inside. The officer testified that customers were well aware of what they would see on the inside. (T. 48)

That night, Officer Staggs saw petitioner dance two songs from a juke box. In the first, petitioner was wearing a gold lame' panty and bra outfit. During the second song, petitioner slowly disrobed as she danced until she was nude. She was totally nude maybe 2-3 minutes.

According to the officer's testimony, petitioner touched her breast once and then touched the inside of her thigh once, but petitioner never touched her genitals or exposed her vaginal area. Only pubic hair and her bare breasts were visible. (T. 43, 50-52)

Petitioner testified and denied even touching her breasts because she was careful to avoid doing anything "indecent." She only danced

nude. She testified she had been dancing nude for three years and that was the first time she had ever been arrested. (T. 54) Also, her husband worked there as a doorman, and he testified she was only dancing nude and did no more, and he would not let her work there if she did anything else except dance nude. (T. 56-57)

C. The Municipal Court's finding

In the Pulaski County Municipal Court, petitioner was tried and found guilty and fined $700 plus costs and given 30 days suspended. Arkansas permits trial de novo on appeal in Circuit Court. Petitioner appealed to the Pulaski County Circuit Court.

D. The Circuit Court's finding

Petitioner's Circuit Court court trial de novo was September 6, 1984. After the proof was in, the State argued that mere nudity was enough to convict under the Arkansas indecent exposure

statute, Ark.Stat.Ann. § 41-1812.

> THE COURT: Gentlemen, is the issue in this case whether or not she touched her breasts and/or her pubic area?
>
> MR. KING [Deputy Prosecuting Attorney]: That has absolutely nothing to do with it. (T. 57)

Later, the prosecutor referred to the commentary to § 41-1812 that states that nude dancing would violate the statute. (T. 59) The case was passed to September 21, 1984 for judgment so the trial judge could read petitioner's pretrial brief. (T. 61-62)

When the trial court reconvened on September 21st, the court held that nude dancing alone was enough to violate the Arkansas indecent exposure statute. The trial court rejected the First Amendment free speech or expression defense because her nude dancing had no articulated message.

> In this particular case, Mrs. Young testified that she got up on the stage and took her clothes off and did whatever she felt like. I think that's what she testified to. And the Court finds that that is not a free speech. I don't know whether she was giving a lecture on nuclear arms proliferation or the Grand Gulf issue of the Public Ser-

vice Commission. I don't know what it is. I don't think she had a message.

But anyway, if she is proceeding under the First Amendment, you know, what is the message? And she didn't testify to that. And so, what we have is we have a beer joint that is exploiting the female body as a sales promotion gimmick without any pretense of conveying a legitimate, intellectual, moral, political, scientific thought or position. So, the Court finds that this conduct is in violation of the law and so holds.

I specifically find that this is conduct and not free speech is what I'm really finding.

The Court finds the defendant guilty. (T. 68)

E. The Arkansas Supreme Court's Opinion

Petitioner appealed to the Arkansas Supreme Court which affirmed on July 8, 1985. Young v. State, 286 Ark. 413, 692 S.W.2d 752 (1985). The Arkansas Supreme Court engaged in de novo fact finding and expanded upon the trial court's findings that mere nudity was enough and added that "[f]rom the circumstances in their entirety it is a fair inference that appellant's purpose was to arouse or gratify the sexual desires of others." Id., at 417, 692 S.W.2d at 754. However, the officer's testimony was that she was eight to ten feet from her in front and could not see petitioner's labia. The Arkansas Supreme Court inexplicably decided, however, that the "anyone [in front of the stage] could see the vaginal area or labia." Id. at 416, 692 S.W.2d at 754. This conclusions is based on a wholly disputed factual issue where there was no such finding below.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IN FINDING PETITIONER'S NUDE DANCING WAS NOT PROTECTED SPEECH IS CONTRARY TO THE APPLICABLE DECISIONS OF THIS COURT.

A.

This case arises under an indecent exposure statute which, by its terms, is aimed directly at "flashers" and those who force their nudity on others. Petitioner, however, was prosecuted as

a nude dancer who did nothing more than dance in the nude in an enclosed tavern. Petitioner challenged the law as being unconstitutional as applied to nude dancers. The trial court directly held that nude dancing had no First Amendment protection. The Arkansas Supreme Court recognized that nudity was protected speech, but somehow expanded on the trial court's finding that mere nudity was involved and held that petitioner's limited conduct of once touching her breast and thigh (a fact still disputed by petitioner and never found by the trial court) was more than mere nudity and was conduct "with a purpose to arouse or gratify the sexual desire of himself or of any other person" under the statute, Ark.Stat.Ann. § 41-1812.

Petitioner's challenge to the statute as applied is narrow but valid. Petitioner recognizes the validity of the primary purpose of the law to prosecute "flashers." However, the police successfully used the statute for an unconstitutional purpose to prosecute mere nude dancing for

willing viewers.

B.

The trial court's verdict was based solely on petitioner's dancing nude. Petitioner argued that the Arkansas indecent exposure statute could not constitutionally be applied to nude dancing; it had to be construed to exempt nude dancing. The trial court flatly held that nude dancing was not protected speech relying on Robinson v. State, 253 Ark. 882, 489 S.W.2d 503 (1973) (nude dancing has no First Amendment protection) and ignoring decisions of this Court relied on by petitioner below (see cases cited in Part C, infra). On appeal, the fair import of the Arkansas Supreme Court decision is that the court made de novo findings of fact to avoid the express issue raised here. While agreeing that nude dancing is protected speech, the court found that this case may not involve mere nudity. Young v. State, supra, at 417, 692 S.W.2d at 754.

These findings of the Arkansas Supreme Court are not binding on this Court, particularly in a First Amendment case. This Court should make an independent review of the facts to determine whether the statute as applied is constitutional. As this Court said in Jacobellis v. Ohio, 378 U.S. 184, 188-89 (1964):

> In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case. E.g., Watts v. Indiana, 338 U.S. 49, 51; Norris v. Alabama, 294 U.S. 587, 590. And this has been particularly true where rights have been asserted under the First Amendment guarantees of free expression. Thus in Pennekamp v. Florida, 328 U.S. 331, 335, the Court states:
>
> > "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they * * * are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect."

We cannot understand why the Court's duty should be any different in the present case,

> where Jacobellis has been subjected to a criminal conviction for disseminating a work of expression and is challenging that conviction as a deprivation of rights guaranteed by the First and Fourteenth Amendments. (footnotes omitted)

Accord: Edwards v. South Carolina, 372 U.S. 229, 235 (1963); New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964); Jenkins v. Georgia, 418 U.S. 153, 160-61 (1974); In re Primus, 436 U.S. 412, 434 (1978).

The findings that should be followed are those of the trial court. Judge Lofton heard the evidence, and he found, at the State's request, that the facts showed mere nudity. The Arkansas Supreme Court's gratuitous finding of fact of something beyond mere nudity when that was disputed and when the only fact findings at trial involved mere nudity is totally unwarranted. Circuit Judge Lofton asked the prosecutor if something more than nudity was involved, and the prosecutor said no. (T. 57) The State is estopped to argue differently in this Court. In addition, the police sweep in this case was to arrest nude dancers. As Officer Skaggs testi-

fied, she was told that nudity was to be the sole basis for an arrest.

The trial court flatly refused to recognize any First Amendment protection in nude dancing. On appeal to the Arkansas Supreme Court, petitioner argued that mere nudity had constitutional protection and the Arkansas indecent exposure statute was used in this case to prosecute protected speech. Therefore, she argued, the statute is overbroad when applied to nude dancing but not overbroad when applied to "flashers" or those who force their nudity on others. The Arkansas Supreme Court did recognize constitutional protection in nude dancing, but somehow held that the conduct of petitioner, never found by the trial court, was within the statutory prohibition and was not mere nudity.

The Arkansas Supreme Court's finding is unsupported by the record and seems designed to avoid the constitutional question squarely presented to it and this Court.

C.

The Arkansas indecent exposure statute, Ark.Stat.Ann. § 41-1812, is unconstitutionally overbroad under the First Amendment because it obviously permits prosecution for mere nude dancing, which is exactly what the State did in prosecuting and the trial court did in convicting petitioner of indecent exposure.

Moreover, even if one accepts the findings of the Arkansas Supreme Court, the overbreadth issue still arises because the Arkansas Supreme Court's finding simply demonstrates the overbreadth problem with the statute. As this Court said in its last nude dancing case, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1982):

> Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own. "Because overbroad laws, like vague ones, deter privileged activit[ies], our cases firmly establish appellant's standing to raise an overbreadth challenge." Grayned v. City of Rockford, 408 U.S. 104, 114 (1972).

Nude dancing is entitled to First Amendment

protection as is any of the performing arts. Schad v. Borough of Mount Ephraim, supra; Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975); Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975); California v. La Rue, 409 U.S. 109, 118 (1972). As this Court said in its obscenity cases, "'nudity alone' does not place otherwise protected material outside the mantle of the First Amendment." Schad v. Borough of Mount Ephraim, supra, quoting Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

D.

The State is not without remedy should petitioner prevail. Petitioner argued at trial and on appeal that there is a valid obscenity law which covers nude dancing which has "lewd exhibition of the genitals." Ark.Stat.Ann. § 41-3585.4.[3] Moreover, under this statute, the

---

3. Ark.Sat.Ann. § 41-3585.4 provides:

(1) A person commits an obscene performance at a live public show if he knowingly:

State would have to meet the higher tripartite Miller standard, Miller v. California, 413 U.S. 15 (1973), which is embodied in the statute. The

---

(footnote 2 cont.)

(a) Engages in an obscene performance of sadomasochistic abuse, hard-core sexual conduct, or sexual conduct in a live public show; or

(b) Directs, manages, finances, or presents an obscene performance at a live public show in which the participants engage in sadomasochistic abuse, hard-core sexual conduct, or sexual conduct.

(2) Committing an obscene performance at a live public show is a class C felony.

The definitions section, Ark.Stat.Ann. § 41-3585.1(2,3,5) provides:

(2) "Hard-core sexual conduct" means patently offensive acts, exhibitions, representations, depictions, or descriptions of:

(a) Intrusions, however slight, actual or simulated, by any object, any part of an animal's body, or any part of a person's body into the genital or anal openings of any person's body; or

(b) Cunnilingus, fellatio, anilingus, bestiality, lewd exhibitions of genitals, or excretory functions, actual or simulated.

(3) "Live public show" means a public show in which human beings, animals, or both appear bodily before spectators or customers.

. . .

(5) "Obscene performance" means a play, motion picture, dance, show or other presen-

State, however, avoided using the obscenity law and prosecuted this case because it involved mere nudity which obviously could not have gained a conviction under the obscenity statute.

(footnote 2 cont.)

tation, whether pictures, animated, or live, performed before an audience and which in whole or in part depicts or reveals, sexual conduct, hard-core sexual conduct, or sado-masochistic abuse, or which includes explicit verbal descriptions or narrative accounts of sexual conduct or hard-core sexual conduct, and which:

(a) Depicts or describes in a patently offensive manner, sado-masochistic abuse, sexual conduct, or hard-core sexual conduct;

(b) Taken as a whole, appeals to the prurient interest of the average person, applying contemporary statewide standards; and

(c) Taken as a whole, lacks serious literary, artistic, political or scientific value.

C O N C L U S I O N

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, AR 72201

Attorney for Petitioner

APPENDIX A

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FIRST DIVISION

STATE OF ARKANSAS Plaintiff

v. No. CR 84-883

SONIA YOUNG Defendant

DISCUSSION AT CLOSE OF EVIDENCE
September 6, 1984
[Record on Appeal, pages 57-62]

MR. HALL: The Defense rests.

THE COURT: Gentlemen, is the issue in this case whether or not she touched her breasts and/or her pubic area?

MR. KING: That has absolutely nothing to do with it in my opinion.

THE COURT: Well, the statute says, "exposes his sex organs". He exposes his sex organs. I suppose that [p.58] could be a female, too. "In a public place or public view."

MR. KING: Under 1801, a private or a public club, it doesn't matter.

THE COURT: What's your position, John? I noticed that there was considerable questioning about whether or not she touched her breasts and I just wondered if that's your theory.

The first witness and the only witness for the State said that she stroked her breasts once and your client said she wouldn't do a thing like that. So, I just wondered why. Is that important in this case?

MR. HALL: Well, the State has to prove that it's for sexual gratification. I don't think dancing nude alone satisfies that.

THE COURT: Well, it could be not just for her but for somebody else's and we don't have any patrons here who said that they were or were not sexually gratified by her exhibition.

MR. KING: I don't think it's required that they actually [p.59] are. It's just that's the purpose.

THE COURT: Well, I understand. But he's saying, as I understand, that she wouldn't touch her breasts because that would be for her sexual

gratification and that's not her.

But doesn't the statute say that if she exposes this for the sexual gratification of anyone's sexual desires.

MR. HALL: "With the purpose to."

MR. KING: The last paragraph of the commentary under 1812 seems like it just hits this right on the head. It says that the exhibitionist or dancer -- I forget how they call it -- exposes her sex organs in front of a crowd that it's not going to affront or alarm but they're there to enjoy it.

THE COURT: Any person who shall appear in public places naked or partly so with the intent of making a public exhibition of his nudity or who shall make any obscene exhibition of his person shall be deemed guilty of a misdemeanor.

Let me go back. I heard all the evidence. [p.60] I understand what Mr. King's position is. What's your position?

MR. HALL: Your Honor, I'd like to tender to the Court the pretrial memorandum we filed

below which raises all the arguments.

THE COURT: Has this question been ruled on by any other Circuit Court?

MR. HALL: It's under submission in Fifth Division. It's not been decided.

THE COURT: When is it going to be decided?

MR. HALL: I don't know.

. . .

[p.61] THE COURT: John, I'm going to need time to read this and I want to talk to Judge Clinton [in Fifth Division].

. . .

[p.62] THE COURT: Passed to 9/21/84 at 8:30 for decision.

ORAL FINDINGS FROM BENCH
September 21, 1984
[Record on appeal, pages 64-68]

THE COURT: John, I read your brief and I went to the Law School, believe it or not. I don't generally go over there, as is obvious.

But I did go over and I read the law that you had cited, some Arkansas cases and also read that case you gave be [sic] yesterday out of Massachusetts, I believe it is, isn't it[?]

And this subject is dealt with extensively [p.65] in 49 ALR 3rd 1084. And in the annotation there, and also in Robinson v. State, 489 S.W.2d 1203, out of this Court, Judge Kirby dealt with this issue and -- Fred Jones, I think it is that wrote the opinion. Supreme Court [Justice] Jones held that the arrest of a female performer without prior adversary hearing after they had danced on stage clad only in briefs covering the lower part of their body did not constitute a prior restraint on the exercise of freedom of expression and the painting of the performer's breasts by a male participant using fluorescent paints added nothing to the freedom of expression.

The Court finds in this case that the conduct occurred at D. L.'s Bar, D. L.'s Darkroom or whatever the name of the place is, which is a

place that sells alcohol in compliance with an Arkansas Beverage Control Commission license. And there's an annotation dealing with that -- In this annotation there's a case dealing with that. And I'll read from that.

"Prohibition where food and liquor is sold, this is not free speech but conduct. This has resulted in the competitive exploitation of the female that is offensive to the public morals. The Court concluded that when nudity is employed as a sales promotion in bars and restaurants nudity is conduct and a fit subject [p.66] for government regulations, not sufficient substance to present a First Amendment question." Except in places provided for such exposure outside of the home, to-wit: restroom facilities, bath houses and so on and so forth but specifically not bars and beer joints. This case said that such is a proper conduct of regulation by the State.

In this particular case, Mrs. Young testified that she got up on the stage and took her

clothes off and did whatever she felt like. I think that's what she testified to. And the Court finds that that is not a free speech. I don't know whether she was giving a lecture on nuclear arms proliferation or the Grand Gulf issue of the Public Service Commission. I don't know what it is. I don't think she had a message.

But anyway, if she is proceeding under the First Amendment, you know, what is the message? And she didn't testify to that.

And so, what we have is we have a beer joint that is exploiting the female body as a sales promotion gimmick without any pretense of conveying a legitimate, intellectual, moral, political, scientific thought or position.

So, the Court finds that this conduct is in violation of the law and so holds. [p.67]

Now, what is the range here, John?

I specifically find that this is conduct and not free speech is what I'm really finding.

MR. HALL: I don't know if it's a Class A

misdemeanor or not.

MR. KING: It is. It's one year to One Thousand Dollar maximum.

THE COURT: Okay.

MR. HALL: I want the Court to, if possible, respond on the record to certain inquiries to make a record for an appeal.

THE COURT: No. You can do that out there. I've read the law and you can argue with it. The facts are there. So, I've found whatever I've found.

MR. HALL: Okay.

THE COURT: The Court finds the defendant guilty. One year in the County Jail, suspended on written rules. And one of those will be that she not display herself [p.68] in a public place for commercial exploitation or sales promotion anymore.

Written rules, fine of a Thousand Dollars, plus costs.

MR. HALL: For the record, your Honor, I need to object to the condition of probation as

being contrary to the First Amendment as well.

THE COURT: I understand.

Pass to -- Incidentally, it's not probation. It will be unsupervised. It's a condition of her not being incarcerated but it's not probation.

MR. HALL: Okay.

THE COURT: I think the point is made. I just don't want to get into the probation business.

APPENDIX B

Sonia YOUNG v. STATE of Arkansas

CR 85-51

Supreme Court of Arkansas
Opinion delivered July 8, 1985

[286 Ark. 413, 692 S.W.2d 752]

Appeal from Pulaski Circuit Court, First Division; Floyd J. Lofton, Judge; affirmed as modified.

STEELE HAYS, Justice. Appellant, Sonia Young, was charged and convicted of indecent exposure under Ark.Stat.Ann. § 41-1812 (Repl. 1977), for nude dancing in a local nightclub. Appellant challenges the conviction on essentially two grounds: first, that her behavior did not constitute an offense under the statute and second, that her conduct was protected under the First Amendment. We find no merit in either contention.

Ark.Stat.Ann. § 41-1812 provides:

> Indecent exposure. (1) A person commits indecent exposure if, with purpose to arouse or gratify the sexual desire of himself or of any other person, he exposes his sex organs:

> (a) a public place or public view; or
> (b) under circumstances in which he knows his conduct is likely to cause affront or alarm.
>
> (2) Indecent exposure is a class A misdemeanor.

Appellant raises four points in her argument that her behavior did not constitute an offense under the statute. She contends first that the purpose of the statute is to criminalize the conduct of "flashers" and not nude dancers. The Commentary to the statute, however, makes it quite clear that appellant's dancing was indeed intended to be covered by the statute:

> "If an exhibition covered by subsection (b) occurs in a public place or in public view, then the actor also falls within subsection (a). However, subsection (a) is primarily directed at the professional exhibitionist before a willing audience whose reaction to the exposure of sex organs is likely to be quite the opposite of affront or alarm."

Appellant next argues her performance did not occur in a public place or public view. Ark.Stat.Ann. § 41-1801(6) defines public place as one publicly or privately owned "to which the public or substantial numbers of people have access." The Commentary notes:

> "Public place" is defined broadly to include any locality to which substantial numbers of people have access . . . As expressly stated in the definition, whether the property is publicly or privately owned is not a determinative factor. Hence a bar or even a private club can be a "public place" if open to substantial numbers of people. Implicit in the definition of public place is that it must be accessible to substantial numbers of people at any one time. A place that is licensed to the general public, but is available to only a few members of the public at any one time, as for example a motel or hotel room, is not a "public place."

The establishment in this case was a public tavern, not a private club, and at the time of the arrest was serving thirty to forty patrons. Appellant does not deny the bar was a public place but asks us to narrow the definition to exclude establishments that limit their fare only to consenting adults and forewarned viewers. This proposition is contrary to the stated intent of the statute and one more appropriately addressed to the legislature than to the courts.

Appellant claims her actions did not involved the exposure of her sexual organs. She concedes her pubic area was exposed, but her sex organs "scrupulously were [illegible]." There is no

testimony to support that contention however and the arresting officer testified that people were sitting below the stage and from that position anyone could see the vaginal area or labia.

As her last point in this argument, appellant insists there was no proof she was dancing to arouse or gratify the sexual desires of herself or others. We have said one's intent or purpose ordinarily cannot be shown by direct evidence but must be inferred from the facts and circumstances shown in evidence. Owens v. State, 283 Ark. 327, 675 S.W.2d 384 (1984); Johnson & Carrol v. State, 276 Ark. 56, 632 S.W.2d 516 (1982). Here there was a sign outside the building advertising nude dancing with the silhouette of a dancing woman painted on the building. Inside there was a stage where appellant performed. The arresting officer testified appellant removed a brief outfit and while dancing ran her hand over her breast, down over her stomach and rubbed herself on the inner thigh below the vaginal area. As

mentioned earlier, there were thirty to forty patrons in the tavern at the time. From the circumstances in their entirety it is a fair inference that appellant's purpose was to arouse or gratify the sexual desires of others.

Appellant's remaining constitutional arguments are premised on the argument that her behavior was "mere nude dancing" and entitled to First Amendment protection under the Constitution of the United States. We do not take issue with that contention, except to note that the statute and activity in this case do not deal merely with nudity or nude dancing, but with something more as proscribed by the statute. Appellant makes no argument that the proscribed activity under the statute is entitled to First Amendment protection, only that mere nude dancing is entitled to such protection. As we have said, appellant's conduct in this case was not simply nudity, but conduct that came within the proscriptions of Ark.Stat.Ann. § 41-1812. As we hold appellant's conduct not to be mere

nudity, and since appellant does not argue the proscribed activity under the statute is constitutionally protected, there is no need to address the remaining aspects of the arguments.

The court suspended imposition of appellant's sentence for one year on condition that she "not display herself in a public place for commercial exploitation or sales promotion" nor "display herself nude in bars or beer joints." Appellant challenges this condition as a prior restraint in violation of the First Amendment.

Ark.Stat.Ann. § 41-1203, conditions of suspension or probation, states in part that the court "shall attach such conditions as are reasonably necessary to assist the defendant in leading a law-abiding life." The statute lists some of the possible conditions the court may attach, including that a defendant be required to "refrain from frequenting unlawful or designated places or consorting with designated persons," and "any other conditions reasonably related to the rehabilitation of the defendant and not

unduly restrictive of his liberty . . ."

The broad objectives sought by probation are education and rehabilitation, and the conditions of probation and suspension should promote those objectives. It is generally held that conditions for probation will be upheld if they bear a reasonable relationship to the crime committed or to future criminality. 21 Am.Jur.2d § 676. Additionally, a condition of a probation or suspension is not necessarily invalid simply because it restricts a probationer's ability to exercise constitutionally protected rights. Id.; U.S. v. Tonry, 605 F.2d 144 (5th Cir.1979); Owens v. Kelley, 681 F.2d 1362 (11th Cir.1982); U.S. v. Pierce, 561 F.2d 735, cert. den., 1978, 435 U.S. 923 (9th Cir.1977).

In this case, the activity prohibited by the conditions imposed might well involve some protected forms of expression. See, Schad v. Borough of Mount Ephraim, 452 U.S. 67 (1981); Wild Cinemas of Little Rock, Inc. v. Bentley, 499 F.Supp. 655 (1980). Yet our greater

concern with this condition is that it may be vague and overbroad. See, In Re Mannino, 14 Cal. App. 3d 952, 92 Cal. Rptr. 880 (1971); Tonry, supra. It includes areas of First Amendment protection and other activities as well, that may have no relationship to appellant's crime, rehabilitation or future criminality. And while a condition of probation or suspension may affect the exercise of a constitutional right within certain limits, those limits include a requirement that it bear a reasonable relationship to the crime and to future criminality.

U.S. v. Tonry, supra, adopts a test developed by the Ninth Circuit to determine whether a probation condition is unduly intrusive on constitutional rights:

> The conditions must be "reasonably related to the purposes of the act." Consideration of three factors is required to determine whether a reasonable relationship exists: (1) the purposes to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement.

Insofar as the condition imposed here

includes prohibition from a nude display for "commercial exploitation or sales promotion," we find the order too broad, vague and insufficiently tailored to bear a reasonable relationship to probation/suspension objectives of rehabilitation and future criminality. That part of the order that prohibits appellant from appearing nude in bars or beer joints is valid. Granted, the condition may involve some infringement on the exercise of appellant's First Amendment rights, as would be determined by the form of expression appellant's dancing might take, but it nevertheless is reasonably related to the offense and to rehabilitation. As to the other guidelines stated in Tonry, we find the limitation on appellant neither harsh nor unduly restrictive, and the purposes of enforcement of the law appellant violated are served. The condition of probation, to the extent necessary to bring it into compliance with this opinion, is modified and the judgment is affirmed.

Affirmed. DUDLEY, J., not participating.

OPPOSITION

BRIEF

No. 85-391

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

SONIA YOUNG ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*JOHN STEVEN CLARK
Attorney General

By: DONNIE GRIFFIN
Assistant Attorney General
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201
(501) 371-2007

Attorneys for Respondent
**Counsel of Record*

FORMS MANAGEMENT COMPANY

QUESTION PRESENTED FOR REVIEW

WHETHER ARKANSAS' INDECENT EXPOSURE STATUTE IS UNCONSTITUTIONALLY OVERBROAD.

Table of Contents

TABLE OF AUTHORITIES

No. 85-391

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

SONIA YOUNG ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, the State of Arkansas, responds to petitioner's petition for writ of certiorari to the Arkansas Supreme Court.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported as *Young* v. *State*, 286 Ark. 413, 692 S.W.2d 752 (1985).

The Court's opinion is reproduced in petitioner's Appendix B.

JURISDICTION

Respondent agrees that this Court has discretional jurisdiction to review this case pursuant to 28 U.S.C. §1257.

STATEMENT OF THE CASE

Petitioner's statement of the case adequately apprises the Court of the context in which the issues arose.

REASONS FOR DENYING THE WRIT

Petitioner was convicted of violating Arkansas' Indecent Exposure Statute. Ark. Stat. Ann. §41-1812 (Repl. 1977). This statute provides:

> A person commits indecent exposure if, with purpose to arouse or gratify the sexual desire of himself or of any other person, he exposes his sex organs:
>
> (a) in a public place or public view; or
>
> (b) under circumstances in which he knows his conduct is likely to cause affront or alarm.

Petitioner contends that this statute permits prosecution for mere nude dancing and is, therefore, unconstitutionally overbroad. Petitioner's conduct included a complete disrobing of her body, stroking her breasts and touching of her inner thigh below the pubic area. From the record, it is also clear that the entire vaginal area could be seen by those around the stage.

The statute in question is narrowly drawn to respond to the government's interest in protecting the public morals. The statute is directed at non-verbal physical conduct in which one exposes a sex organ for the sexual gratification of himself or others.

Where conduct and not mere speech is involved, overbreadth scrutiny has generally been somewhat less rigid. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). Overbreadth has

always been an exception to traditional rules and limited to statutes which are aimed at spoken words. *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Broadrick* v. *Oklahoma*, *supra*.

Furthermore, respondent submits that the facts of the present case involve the customary "bar room" type of nude dancing which contains little, if any, expression. As such, it deserves only the minimum protection under the First Amendment. *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975). As this Court stated in *California* v. *La Rue*, 409 U.S. 109 (1972):

> As the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases.

Conduct in violation of valid laws is not protected by the First Amendment. *Cox* v. *Louisiana*, 379 U.S. 536 (1965). In cases of this kind, the Court must look to the substance of the regulation and ask whether the elements of communication which may be present in the regulated conduct are significant enough to bring the entire course of conduct under the protection of the First Amendment. *Schneider* v. *State*, 308 U.S. 147 (1939).

The decision rendered by the Arkansas Supreme Court stated that petitioner's "conduct in this case was not simply nudity, but conduct that came within the proscriptions of Ark. Stat. Ann. §41-1812." (Petitioner's Appendix B, 14a). By so concluding, the Arkansas Supreme Court decided this case in accord with the applicable decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied in this case for the following reasons:

(1) no conflict exists between the decision in this case and prior decisions of this Court.

(2) this case presents no new questions under the First Amendment.

Respectfully submitted,

•JOHN STEVEN CLARK
Attorney General

By: CONNIE GRIFFIN
Assistant Attorney General
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201
(501) 371-2007

Attorneys for Respondent
•*Counsel of Record*

OPINION

SUPREME COURT OF THE UNITED STATES

SONIA YOUNG v. ARKANSAS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 85-391. Decided January 13, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Ark. Stat. Ann. §41-1812 (1977) provides, in pertinent part, that "[a] person commits indecent exposure if, with purpose to arouse or gratify the sexual desire of himself or of any other person, he exposes his sex organs . . . in a public place or public view. . . ."* Petitioner was a nude dancer at D.L.'s Darkroom, a tavern in Little Rock, Arkansas. Along with nearly every other nude dancer in the metropolitan area, petitioner was arrested in one of two "sweep" operations conducted in February, 1984. At a bench trial, an undercover police officer testified that once during her dance, petitioner touched her breasts, and then touched the inside of her thighs. At no time did petitioner expose her vaginal area or touch her genitals. The metropolitan court convicted petitioner for indecent exposure under Section 41-1812, fined her $700.00 and gave her a thirty day suspended sentence.

The Pulaski County Circuit Court conducted a trial *de novo* on appeal. The court held that mere nude dancing violated the statute, and rejected petitioner's First Amendment de-

*Ark. Stat. Ann. §41-1812 (1977) provides as follows:

Indecent exposure. (1) A person commits indecent exposure if, with purpose to arouse or gratify the sexual desire of himself or of any other person, he exposes his sex organs:

(a) in a public place or public view; or

(b) under circumstances in which he knows his conduct is likely to cause affront or alarm.

(2) Indecent exposure is a class A misdemeanor.

...se on the grounds that her nude dancing had no articu...ated message. Pet. for Cert. 13–14. The court affirmed petitioner's conviction, and imposed a one-year suspended sentence on the condition that she not "display herself in a public place. . . ." App. to Pet. for Cert. A–8.

The Ark. Sup. Ct. affirmed, both on the ground that petitioner's conduct violated the statute and because such behavior was not protected by the First Amendment. *Young* v. *State*, 286 Ark. 413, 692 S. W. 2d 752 (1985). With respect to the statutory argument, the court noted that Section 41–1812 was intended to cover both nude dancing and "flashers." *Id.*, at 415, 692 S. W. 2d, at 753. Turning to petitioner's constitutional argument, the court "did not take issue" with petitioner's contention that "mere nude dancing" is entitled to First Amendment protection, but found under the facts of this case that petitioner's conduct "was not simply nudity. . . ." *Id.*, at 417, 692 S. W. 2d, at 754. Instead, "while dancing [petitioner] ran her hand over her breast, down over her stomach and rubbed herself on the inner thigh below the vaginal area." *Ibid.* Because petitioner did not argue that such conduct is constitutionally protected, the court did not address the remaining aspects of her constitutional argument. *Ibid.*

Petitioner maintains that, as applied to mere nude dancing, Section 41–1812 is overbroad and substantially abridges First Amendment rights. Regardless of whether and how petitioner might have touched herself during her performance, she has standing to raise this overbreadth challenge. See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, —— U. S. ——, —— (1984); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 633–635 (1980); *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611–612 (1973).

In *New York State Liquor Authority* v. *Bellanca*, 452 U. S. 714 (1981) and *California* v. *LaRue*, 409 U. S. 109 (1972), the Court held that states may regulate nude dancing

in establishments licensed to serve liquor by virtue of the power conferred under the Twenty-First Amendment. In both cases, however, the Court intimated that statutes which seek to regulate nude dancing in public places other than bars and taverns might contravene the dictates of the First Amendment, as this form of entertainment might be entitled to constitutional protection. *New York State Liquor Authority* v. *Bellanca*, *supra*, at 718; *California* v. *LaRue*, *supra*, at 118. Indeed, in *Schad* v. *Borough of Mount Ephraim*, 452 U. S. 61, 66 (1981), the Court expressly stated that "nude dancing is not without the First Amendment protections from official regulation." See also *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 933–934 (1975); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 557–558 (1975).

Given these repeated indications that barroom-type nude dancing is a type of expression that is protected under the First Amendment under some circumstances the Court should grant the petition for certiorari in this case in order to explore the propriety of Arkansas' regulation. Section 41–1812 does not prohibit nudity only in establishments possessing liquor licenses. Instead, it criminalizes non-obscene nudity in any public place so long as its purpose is to gratify the sexual desire of another person. Arkansas thus cannot rely on the Twenty-First Amendment as a sufficient basis to justify its statute, and instead, must demonstrate a compelling state interest sufficient to prohibit the exercise of a protected form of expression. See *Doran* v. *Salem Inn, Inc.*, *supra*, at 933–934; *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968).

In his dissent in *New York Liquor Authority* v. *Bellanca*, *supra*, JUSTICE STEVENS noted that "[a]lthough the Court has written several opinions implying that nude or partially nude dancing is a form of expressive activity protected by the First Amendment, the Court has never directly confronted the question." 452 U. S., at 718–719. I believe it is time to do so. The state courts are in disagreement over the reach

of the First Amendment in this area. See generally Barbre, Topless or Bottomless Dancing or Similar Conduct as Offense, 49 A.L.R. 3d 1084, §§ 3, 5 (1973 & 1985 Supp.) (collecting cases). In addition, this case does not present the complications of local police power over zoning, as found in *Schad* v. *Borough of Mount Ephraim*, *supra*, or the question of States' rights under the Twenty-First Amendment present in *California* v. *LaRue*, *supra*, *Doran* v. *Salem Inn, Inc.*, *supra*, and *New York Liquor Authority* v. *Bellanca*, *supra*.

For these reasons, I would grant the petition for certiorari.